

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC SOUND RESOURCES, a Washington
non-profit corporation; and THE PORT OF
SEATTLE, a Washington municipal corporation;

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY, a Delaware
corporation; J.H. BAXTER & CO., a California
limited partnership; J.H. BAXTER & CO., a
California corporation; and J.H. BAXTER & CO.,
INC., a California corporation.

Defendants.

No. C04-1654L

**PLAINTIFF PACIFIC SOUND
RESOURCES' MOTION FOR
RECONSIDERATION OF ORDER
GRANTING MOTION FOR
SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:
FEBRUARY 21, 2006**

I. RELIEF REQUESTED

Plaintiff Pacific Sound Resources (PSR) respectfully requests that the Court reconsider its February 6, 2006 Order Granting Motion for Summary Judgment on grounds of lack of Article III standing. Since this case was originally removed from state court under 28 U.S.C. § 1441, PSR requests that the Court modify its order dismissing PSR's claims and instead enter an order remanding the case to state court as required by 28 U.S.C. § 1447(c).

II. STATEMENT OF FACTS

Plaintiffs originally brought their cost recovery claims against BNSF and the other defendants in a single lawsuit in state court. On September 25, 2002, plaintiffs PSR and the Port of Seattle (Port) filed suit in King County Superior Court against BNSF and other

1 defendants, seeking recovery of environmental cleanup costs and declaratory relief related to
2 the Wyckoff West Seattle Site (the “2002 King County Suit”). Wood treating operations had
3 contaminated the upland area surrounding the treating plant, as well as the sediments in Elliott
4 Bay adjacent to the plant. Plaintiffs sued to recover the costs of cleaning up both portions of
5 the Site, asserting causes of action based exclusively on state law.

6 On May 25, 2004, the King County Superior Court granted summary judgment in
7 favor of BNSF on statute of limitations grounds. In response to plaintiffs’ motion for
8 clarification or reconsideration, the state court also ruled that plaintiffs’ complaint sought
9 recovery of costs incurred only in the upland portion of the Site, not in the sediments. That
10 order clarified that the summary judgment order did not prevent plaintiffs from filing a
11 separate action asserting claims for sediment cleanup costs. Plaintiffs appealed both orders to
12 the Washington Court of Appeals.

13 While the appeal was pending, plaintiffs filed a new action in King County Superior
14 Court (the “2004 King County Suit”) against all but one of the same defendants named in the
15 2002 King County Suit.¹ Plaintiffs alleged the same facts and the same causes of action that
16 they had asserted in the 2002 King County Suit. However, in response to the trial court’s
17 orders on summary judgment and clarification, the 2004 King County Suit sought recovery of
18 cleanup costs for sediments only.

19 BNSF then removed the 2004 King County Suit—this action—to federal court on
20 grounds of diversity jurisdiction. On April 22, 2005, plaintiffs asked this Court to stay the
21 federal court action pending the outcome of the state court appeal. *See* Plaintiffs’ Motion for
22 Stay. Plaintiffs argued that if the state court appeal was successful, the sediments and
23 uplands claims could be recombined in a single lawsuit, which would make the litigation far
24 more efficient for the courts and for the parties. *Id.* at 5. This Court denied plaintiffs’
25 motion.

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27 ¹ The State of Washington was a defendant in the 2002 King County Suit, but it settled with plaintiffs
before the 2004 King County Suit was filed.

On December 27, 2005, the Washington Court of Appeals reversed the summary judgment order in the 2002 King County Suit and remanded the case for trial. *See Pac. Sound Res. v. Burlington N. Santa Fe Ry. Corp.*, __ Wn.2d __, 125 P.3d 981 (2005) (copy attached as Exhibit A). The state Court of Appeals ruled that plaintiffs' MTCA claims were not barred by the statute of limitations.² 125 P.3d at 986. In a footnote, the Court of Appeals also wrote that plaintiffs' complaint in the 2002 King County Suit "sought contribution for the remedial costs incurred at the entire Site *including sediments*." 125 P.3d at 985 n.8 (emphasis added). BNSF recently filed a petition asking the Washington Supreme Court to review the Court of Appeals' decision.

On February 6, 2006, this Court entered its Order Granting Motion for Summary Judgment, which concluded that PSR lacked Article III standing to maintain this action in federal court. This motion asks the Court to remand the case to state court, where it originated and where it can be consolidated with the 2002 King County Superior Court case, if and when that case is remanded for trial.

III. ARGUMENT AND AUTHORITIES

The Court has ruled that PSR, by entering into a Consent Decree in August 1994, and paying money to the PSR Environmental Trust pursuant to that decree, suffered a "concrete and particularized" injury. Order Granting Motion for Summary Judgment at 7. In addition, "[b]ecause PSR faced increased expense due to BNSF's alleged pollution," the Court has determined "that BNSF may have caused, at least in part, the injury to PSR." *Id.* The Court has nevertheless concluded that PSR lacks standing under Article III to assert claims against BNSF because the benefit of the remedy available under such claims will accrue to another party, so even a favorable outcome cannot redress the harm PSR suffered. *Id.* at 8.

The Court's ruling that PSR failed to meet the requirements for Article III standing is a determination that it lacks subject matter jurisdiction over PSR's claims. *Cetacean Cmty. v.*

² However, the state court held that plaintiffs' common law theories of trespass, nuisance, and negligence were barred by the statute of limitations. 125 P.3d at 990.

1 *Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004) (“a suit brought by a plaintiff without Article III
 2 standing is not a ‘case or controversy,’ and an Article III federal court therefore lacks subject
 3 matter jurisdiction over the suit”). *See also Maine Ass’n of Interdependent Neighborhoods*
 4 (*“MAIN”*) v. *Comm’r, Maine Dep’t of Human Servs.*, 876 F.2d 1051, 1053 (1st Cir. 1989)
 5 (that plaintiffs “did not fulfill the minimal, constitutional requirements for standing” is a
 6 “determination that the district court lacked subject matter jurisdiction”).

7 Where a district court determines that it does not have subject matter jurisdiction over
 8 a case removed under 28 U.S.C. §§ 1441, 1446, the court must remand the case to state court.
 9 28 U.S.C. § 1447(c). In *MAIN*, for example, defendants removed a state court action, then
 10 sought and procured dismissal of the action on the grounds that plaintiff lacked Article III
 11 standing. On appeal, the First Circuit ruled that dismissal was improper. It found that “the
 12 literal words of the statute required the district court to remand the case.” 876 F.2d at 1054
 13 (citation omitted).

14 This rule of law has been universally recognized and applied by every Circuit Court
 15 that has considered the issue, including the Ninth Circuit. *See Lee v. Am. Nat’l Ins. Co.*, 260
 16 F.3d 997, 1006 (9th Cir. 2001), *cert. denied*, 535 U.S. 928, 122 S. Ct. 1299 (2002) (if federal
 17 court lacks subject matter jurisdiction over case removed from state court, 28 U.S.C. § 1447(c)
 18 requires that the case be remanded to state court); *Albingia Versicherungs A.G. v. Schenker*
 19 *Int’l, Inc.*, 344 F.3d 931, 938 (9th Cir. 2003), *opinion amended and superseded on denial of*
 20 *rehearing*, 350 F.3d 916 (9th Cir. 2003), *cert. denied*, 541 U.S. 1041, 124 S. Ct. 2162 (2004)
 21 (“[S]ection 1447(c) means that if it is discovered at any time in the litigation that there is no
 22 federal jurisdiction, a removed case must be remanded to the state court rather than
 23 dismissed”). *See also Smith v. Wisconsin Dep’t of Agric., Trade and Consumer Prot.*, 23 F.3d
 24 1134, 1142 (7th Cir. 1994) (remand is proper remedy for a district court’s lack of subject
 25 matter jurisdiction over an action removed to that court); *Roach v. West Virginia Reg’l Jail &*
 26 *Corr. Facility Auth.*, 74 F.3d 46, 49 (4th Cir. 1996) (absence of federal subject matter
 27 jurisdiction requires remand to state court); *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405,

410 (11th Cir. 1999) (remand under § 1447(c) “is mandatory”); *Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 213–14 (3rd Cir. 1997) (federal court lacking jurisdiction over an action removed from state court “must remand”); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488 (6th Cir. 1999) (“the literal words of § 1447(c) . . . on their face, give . . . no discretion to dismiss rather than remand an action”).

Because remand is mandatory, this Court need not speculate whether the state court has subject matter jurisdiction over the case.³ The remand statute does not provide a “futility exception.” See *Coyne*, 183 F.3d at 496 (holding (1) that “the futility of a remand to state court does not provide an exception to the plain and unambiguous language of § 1447(c)” and (2) that “there is no implicit futility exception hidden behind the plain language of § 1447(c)”; *MAIN*, 876 F.2d at 1056 (plaintiffs “should have a chance to try” to establish jurisdiction in state court); *Univ. of S. Ala.*, 168 F.3d at 410 (§ 1447(c) “is mandatory and may not be disregarded based on speculation” regarding futility); *Bromwell*, 115 F.3d at 213–14 (federal court lacking jurisdiction over an action removed from state court “must remand and not dismiss on the ground of futility”).

Here, the Court’s Order Granting Motion for Summary Judgment in favor of BNSF deprived the Court of subject matter jurisdiction over the case. The Court concluded that PSR lacked standing to assert its claims in federal court. The Court previously ruled that the Port had incurred no compensable damages and on that basis granted summary judgment for BNSF on the Port’s claims. Thus, the Court has no subject matter jurisdiction over any claims left in the case.⁴ Under 28 U.S.C. § 1447(c), the case must be remanded to state court.

³ Washington rules of standing differ from those developed under Article III of the United States Constitution. Under Washington law, courts ask two questions to determine whether a party has standing: first, whether the interest asserted is arguably within the zone of interests to be protected by the statute or constitutional guaranty in question; and second, whether the party seeking standing has suffered from an injury in fact, economic or otherwise. See *Branson v. Port of Seattle*, 152 Wn.2d 862, 875–76, 101 P.3d 67 (2004).

⁴ Defendants BNSF and Baxter asserted counterclaims and cross-claims, but all such claims are contingent on defendants first being found liable on plaintiffs’ claims. For example, BNSF asserted counter- and cross-claims based on MTCA apportionment and equitable contribution. However, BNSF claimed that it was entitled to relief under these theories only “[i]f BNSF is held liable for any remedial action costs alleged by Plaintiffs.” See Amended Answer, Affirmative Defenses, Counter-Claim, and Cross-Claim of Defendant The

1 **IV. CONCLUSION**

2 For the foregoing reasons, PSR respectfully requests that the Court reconsider its order
3 dismissing PSR's claims, and instead remand this case to state court.

4 Dated: February 21, 2006.

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Burlington Northern and Santa Fe Railway Company ("BNSF Answer") at 16. Each of defendants' counter- and cross-claims is similarly framed. *See* BNSF Answer at 16–23 (¶¶ 8, 9, 17, 18, 41, 45, 46); Answer, Counter-Claim and Cross-Claim of Defendant J.H. Baxter & Co., a California Corporation at 17–21 (¶¶ 17, 18, 45, 46); Answer, Counter-Claim and Cross-Claim of Defendant J.H. Baxter & Co., Inc., a California Corporation at 17–20 (¶¶ 17, 18, 45, 46); and Answer, Counter-Claim and Cross-Claim of Defendant J.H. Baxter & Co., a California Limited Partnership at 18–22 (¶¶ 17, 18, 45, 46). Because under the Court's order defendants cannot be held liable to plaintiffs in federal court, these counter- and cross-claims are not remaining for resolution, and they do not prevent the Court from remanding the entire case to state court.

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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